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No.

IN THE

Supreme Court of the United States

October Term, 1980

JEANNE BRANDON, et al.,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE GUILDERLAND SCHOOL DISTRICT, et al.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE CENTER FOR LAW AND RELIGIOUS FREEDOM OF THE CHRISTIAN LEGAL SOCIETY AS AMICUS CURIAE IN SUPPORT OF THE GRANTING OF CERTIORARI

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BRIEF OF THE CENTER FOR LAW AND RELIGIOUS FREEDOM OF THE CHRISTIAN LEGAL SOCIETY AS AMICUS CURIAE IN SUPPORT OF THE GRANTING OF CERTIORARI

INTEREST OF AMICUS CURIAE [1]

The Christian Legal Society is a non-profit Illinois corporation founded in 1961 as a professional association of Christian judges, attorneys and law students. Today it includes over 2500 members throughout the United States. The Center for Law and Religious Freedom is a division of the Christian Legal Society founded in 1975 to protect, promote, assure and enhance the freedom of Christians in the exercise of their faith which is guaranteed by the United States Constitution. The Center attempts to marshal the necessary legal skills and resources to enable the Christian Legal Society to act where the rights of Christians to exercise and express their faith are being improperly infringed. The Center has participated as amicus curiae in numerous legal and administrative proceedings. Its resources include, for example, prominent constitutional attorneys and an overview of national trends. In pursuit of its goals, the Center also has held numerous regional or national conferences providing continuing legal education by experts in fields which impact upon religious freedom. The Center's national membership and professional resources thus enable it to focus attention upon unconstitutional incursions on religious freedom that would otherwise go unrecognized. This brief is filed to provide the Court with the views of amicus on aspects of the Equal Protection and Religion Clauses which amicus believes have not been adequately addressed to date.

1. The letters of consent of the parties to the filing of this brief are being filed with the Clerk pursuant to Rule 36.1.

STATEMENT OF THE CASE

In this case a group of high school students sought permission to use a room in their school in order to engage in voluntary communal morning prayer in compliance with fundamental and central religious beliefs (A50). These students are bused to school from various places around the school district and arrive at school between 7:20 and 7:40 a.m. The formal school day begins at 7:50 a.m. Their meetings were to be held without any official school assistance, supervision, aid or participation and with volunteer adult supervision. Permission to use a room was withheld by the school district despite the fact that other student organizations and the general public are permitted to utilize school facilities (A19, 50). Since these students are scattered around the school district and they must arise early in the morning to catch a bus to school (A55), there is no feasible alternative to holding a communal meeting anywhere other than at school. To do otherwise would require students to rise even earlier in the morning, to forsake transportation by school bus, to travel by some means to another location accessible to all the students, to pray communally and then to find some means of transportation to school.

ARGUMENT

Plaintiffs Have Been Denied Equal Protection of the Law.

A. The Defendants' Actions Intrude Upon a Fundamental Right Thus Making It Appropriate to Apply Strict Equal Protection Analysis.

Plaintiffs have proven a violation of the Equal Protection Clause in this case. This Court has repeatedly held that the Equal Protection Clause of the Fourteenth Amendment, as much as the Due Process Clause, protects individuals against arbitrary state action and forbids any classification which makes irrational distinctions between similarly situated persons or groups. *Eisenstadt v. Baird*, 405 U. S. 438, 446-47 (1972); *Reed v. Reed*, 404 U. S. 71, 75-76 (1971); *Kotch v. Board of River Port Pilot Commissioners*, 330 U. S. 552, 556 (1947). The Court has established two distinct standards for determining whether a statute or rule violates the Equal Protection Clause.[2] In cases involving routine social or economic regulations, a classification is deemed valid unless it is purely arbitrary or "wholly irrelevant to the achievement of the State's objectives." *McGowan v. Maryland*, 366 U. S. 420, 425 (1961); *United States Department of Agriculture v. Moreno*, 413 U. S. 528, 533 (1973). On the other hand, when the classification at issue is inherently "suspect" or when it affects "fundamental rights", the Court has applied a much stricter standard. In such cases, the Court has held that the classification, to be valid, must "promote a *compelling* governmental interest," *Shapiro v. Thompson*, 394 U. S. 618, 634 (1969) (emphasis in original), or serve some "overriding" purpose. *McLaughlin v. Florida*, 379 U. S. 184, 192 (1964). *See also Skinner v. Oklahoma*, 316 U. S. 535, 541 (1942) ("strict scrutiny" of sterilization law required); *Levy v. Louisiana*, 391 U. S. 68, 71 (1968) (Court is "extremely sensitive" to classifications which

2. The Equal Protection Clause, of course, applies to classifications created by governmental rule or policy as well as those created by statute. *See e.g., Burton v. Wilmington Parking Authority*, 365 U. S. 715 (1961).

affect "basic civil rights"); *Graham v. Richardson*, 403 U. S. 365, 372 (1971) ("heightened judicial solicitude" is required for certain classes of persons); Note, "Developments in the Law—Equal Protection", 82 *Harv. L. Rev.* 1065, 1076-1132 (1969).

Amicus curiae submits that the stricter standard of equal protection analysis is applicable in this case. The classification at issue here affects a "fundamental right", namely, the constitutional right of these students to freely exercise their religion. Their activity is being classified differently from other activities on campus solely because of the exercise of their religious obligations. Because the defendants' decision to refuse plaintiffs permission to use a room before school for voluntary prayer intrudes upon the plaintiffs' "fundamental rights", it is appropriate to apply the type of strict equal protection scrutiny that was set out by the Court in *Reed v. Reed*, *supra*, and *Craig v. Boren*, 429 U. S. 190, 197 (1976) (the classification "must serve important governmental objectives and must be substantially related to the achievement of those objectives").

In *Johnson v. Robison*, 415 U. S. 361, 375 n. 14 (1974), this Court stated that "[u]nquestionably, the free exercise of religion is a fundamental constitutional right." The Court did not apply a strict scrutiny test in that case only because it rejected the free exercise claim which was proffered. However, it is plain that the Court would have applied the stricter test if it regarded the free exercise claim as being valid. In this case, however, it is uncontroverted that "group prayer is essential to" the plaintiffs' religious beliefs (A12).

In *McDaniel v. Paty*, 435 U. S. 618 (1978), the subject involved herein was addressed by Mr. Justice Brennan in a concurring opinion joined by Mr. Justice Marshall. He stated:

> Whether or not the provision discriminates among religions . . . it establishes a religious classification—involvement in protected religious activity . . . which I believe is absolutely prohibited.

Id. at 631-32. Mr. Justice Brennan went on to note that the Tennessee state constitutional provision in question in *McDaniel*, which barred "[m]inister[s] of the Gospel or priest[s] of any denomination whatever" from serving in public office, "imposes a unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity." *Id.* at 632. In discussing this case, Professor Tribe recently observed that "[b]ecause government may not constitutionally use religion as a basis for such burdensome classification, the law could not stand." L. Tribe, *American Constitutional Law*, 1979 Supplement, at pp. 78-79. Professor Tribe also pointed out that the plurality opinion of Chief Justice Burger required the State, in order to justify its attempted infringement on the appellant's religious activities, to prove "interests of the highest order." *Ibid.* at 79. *Compare, Wisconsin v. Yoder*, 406 U. S. 205, 215 (1972) *and Sherbert v. Verner*, 374 U. S. 398, 406 (1963).

A three-judge federal District Court followed the same approach in *Stacy v. Williams*, 306 F. Supp. 963 (W. D. Miss. 1969). The Court there reviewed, among others, a rule providing that facilities of a University could not be made available for public religious meetings or gatherings to off-campus persons or groups of persons. The Court invalidated the regulation, holding

> [because] this regulation can reasonably be construed to mean that no student religious group may invite outside speakers on religious topics, which prohibition would conflict with the Equal Protection Clause, it must be rejected . . .

Id. at 795. This case, too, illustrates that "religion" is not a reasonable classification and that a State may not choose the broad classification of "religion" for exclusion in its public educational institutions unless it can point to a compelling interest for doing so which cannot be achieved by other means.

B. There Is No Compelling Reason for the School District to Withhold Its Consent to the Use of a Room for Voluntary Prayer Before the Beginning of the School Day.

The school district attempts to justify its position by pointing to the First Amendment's Establishment Clause and contending that any hint of State sponsored establishment of religion is sufficient to prove a compelling interest. It claims that the very fact that a room in the school would be made available to students for the purpose of prayer would constitute State sponsorship.

In determining whether or not the State has shown a compelling interest, the Court must balance the State's interest against all other factors presented in support of the plaintiffs' interests. In assessing the competing interests, it would be well to review this Court's five opinions dealing directly with religious activities of public school pupils. In four of the five cases it was held that public schools cannot *sponsor* religious activities. But a review of the key facts in each case permits considerable insight into what this Court meant by the use of the word "sponsor".

In *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203 (1948), *Engle v. Vitale*, 370 U. S. 421 (1962), *School District of Abington Township v. Schempp*, 374 U. S. 203 (1963), and *Stone v. Graham*, — U. S. —, 101 S. Ct. 192 (1980), the religious activities were (a) originated by the government and (b) curricular in nature. In each it appeared that the state stood behind the ideological content of the doctrinal teaching or exercise. In each the government was sponsoring religion; and that is state action "respecting an establishment of religion" which is forbidden by the First Amendment.[3]

3. Non-curricular religious activity, in the form of religious invocations and benedictions at high school graduation ceremonies, has been approved by the courts. *Grossberg v. Deusebio*, 380 F. Supp. 285 (E. D. Va. 1974); *Wood v. Mt. Lebanon School District*, 342 F. Supp. 1293 (W. D. Pa. 1972); *Wiest v. Mt. Lebanon School District*, 320 A. 2d 362 (Pa. 1974). Religious prayer among con-

But under many circumstances the state may "accommodate" an activity which it can not sponsor. This Court's fifth decision illustrates this principle. In *Zorach v. Clauson*, 343 U. S. 306 (1952), the arrangement was like that in *McCollum* except the weekly religious instruction was not held in the classrooms and the instructors were not under the control of the school. This was held not to be an establishment of religion. The circumstance that *Zorach* approved off-campus activities similar to those which *McCollum* forbade on campus has given rise to the simplistic notion that the only operative facts under the establishment clause are the time and place of the activity. However, Mr. Justice Brennan's concurring opinion in *Schempp, supra*, rejected this concept, pointing out, *id.* at 262, that the "deeper difference was that the *McCollum* program placed the religious instructor in the public school classroom in precisely the position of authority held by the regular teachers of secular subjects, while the *Zorach* program did not."

> To be sure, a religious teacher presumably commands substantial respect and merits attention in his own right. But the Constitution does not permit that prestige and capacity for influence to be augmented by investiture of all the symbols of authority at the command of the lay teacher for the enhancement of secular instruction.

Id. at 263. In a concurring opinion in *McCollum, supra*, at 230-31, four Justices foreshadowed this analysis and stated that the vice of the program was that "the momentum of the whole school atmosphere and school planning is presumably put behind religious instruction, as given in Champaign, precisely in order to secure for the religious instruction such momentum and planning."

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3. (Cont'd.)
senting adults to start public meetings also has been sustained. *Bogen v. Doty*, 598 F. 2d 1110 (8th Cir. 1979); *Lincoln v. Page*, 241 A. 2d 799 (N. H. 1968).

The activity of the plaintiffs consequently should not be condemned simply because it is conducted on school property.[4] Their activity is neither originated by the government nor curricular. If accommodation of a truly voluntary religious activity is involved, religious activity can permissibly occur on school grounds. *See generally,* R. Toms and J. Whitehead, "The Religious Student In Public Education: Resolving A Constitutional Dilemma," 27 *Emory L. J.* 3 (1978). For example, in *Reed v. Van Hoven,* 237 F. Supp. 48, 53 (W. D. Mich. 1965), a District Court upheld a truly voluntary on-campus prayer program which did not appear to have the imprimatur of the school. In *Lawrence v. Buchmueller,* 243 N. Y. S. 2d 87, 90-91 (1963), a New York court found no Establishment Clause violation in a creche being allowed on school property under circumstances which "[u]nlike *Engle* . . . or *Schempp* . . . which concerned active involvement by Government in religious exercises, . . . constitutes, at most, merely a passive accommodation of religion . . . ." Finally, in *Wood v. Mt. Lebanon Township School District,* 342 F. Supp. 1293, 1295 (W. D. Pa. 1972), a District Court found no Establishment Clause violation in allowing invocational and benedictional prayers to be said in on-campus graduation ceremonies where there was no "semblance of governmental establishment or even condonation."

From this analysis it can be concluded that it is permissible for the State to accommodate the religious interests of school pupils on school premises as long as their actions are voluntary and the State avoids the legal stigma of sponsorship. Needless to say, cases in this area are decided on the facts. In this case, it has been demon-

4. The fact that the physical place of the religious activity is not the controlling factor was confirmed in *Moore v. Board of Education,* 212 N. E. 2d 833 (Ohio 1965), where the court would not allow a released-time program off the school campus because the facts indicated that, in the eyes of the pupils, it appeared that the school was conducting the religious instruction.

strated that communal morning prayer is of fundamental and central importance to the plaintiffs in the practice of their religion (A50). The opinion of the Second Circuit expressly acknowledged the importance of the communal aspect of the plaintiffs' morning worship (A12). Moreover, *The Holy Bible* repeatedly stresses the great significance of and obligation to engage in morning prayer. *The Holy Bible* (King James): Psalm 55:17 ("Evening, and morning, and at noon, will I pray . . ."); *Psalm* 119:164 ("Seven times a day do I praise thee . . ."); *Psalm* 5:3; *Psalm* 59:16; *Psalm* 88:13; *Daniel* 6:10; 1 *Thessalonians* 5:17.

If one accepts, as the Court must, *Lewis v. Califano*, 616 F. 2d 73, 79-81 (3d Cir. 1980), the importance to plaintiffs of this religious activity, the next question is whether alternative means are available to plaintiffs. While the Second Circuit accepted the students' contention that "group prayer is essential to their religious beliefs" (A12), it then ignored the thrust of these facts, and concluded that the students will have to worship together in some other location before the school day (A20). But the facts show that this is simply not feasible. Just as in a company town, or on a university campus, *see Marsh v. Alabama*, 326 U. S. 501, 508 (1946); *Keegan v. University of Delaware*, 349 A. 2d 14, 18 (Del. 1975), *cert. denied*, 424 U. S. 934 (1976), the nature of the worship in which these plaintiffs desire to engage is simply foreclosed to them unless it takes place after the school bus arrives at school. They are foreclosed from practicing their religion at any other place with these fellow students because of the early hour at which they would otherwise have to arise and, even more importantly, because of transportation requirements.

It is also worth noting that while the Second Circuit characterized the arrival of the buses as the beginning of the school day, this is not entirely accurate. No formal school activities take place until 7:50, which is the official beginning of the school day. Thus, there would be no interference with any part of the formal school program

if plaintiffs' request were granted. *Cf. Reed v. Van Hoven, supra,* at 50, 54 (Voluntary prayer took place outside the hours of the regular school day).

Withholding of permission in these circumstances, therefore, burdens those with the strongest religious beliefs, those who feel compelled to engage in communal morning prayer. This case is no different than that of the minister prevented from running for office in Tennessee, who felt so strongly about his religion that he had become a minister and thereby placed himself within the coverage of the state constitutional provision, which prohibited his activity. *McDaniel v. Paty, supra.*

C. The Principle of Accommodating Neutrality Would Be Furthered by Allowing These Students to Have Access to a Room Under These Particular Circumstances.

In *School District of Abington Township v. Schempp, supra,* at 225, this Court stated that the government may not affirmatively oppose or show hostility to religion, thus preferring those who believe in no religion over those who believe in religion. Considering the purposes underlying the Religion Clauses, this Court has insisted upon governmental neutrality with respect to religion. In *Walz v. Tax Commission,* 397 U. S. 664, 676 (1970), it was stated:

> Few concepts are more deeply imbedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of *benevolent neutrality* toward churches and religious exercise generally, so long as none was favored over others and none suffered interference.

(emphasis added) *See id.* at 669. As long ago as *Zorach v. Clauson, supra,* at 314, Mr. Justice Douglas stated that government cannot be indifferent to the religious element of our society.

> That would be preferring those who believe in no religion over those who do believe. . . . But we find no

> constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.

This Court recently addressed the issue again, in *Roemer v. Board of Public Works*, 426 U. S. 736 (1976). In upholding Maryland's provision of annual subsidies to eligible colleges and universities against a challenge of unconstitutionality under the Establishment Clause, the Court emphasized:

> A system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church. In fact, our State and Federal governments impose certain burdens upon, and impart certain benefits to, virtually all our activities, and religious activity is not an exception. The Court has enforced a scrupulous neutrality by the State, as among religions and also as between religious and other activities, *but a hermetic separation of the two is an impossibility it has never required.*

Id. at 745-46. (emphasis added)

From such analyses the accommodating neutrality principle has developed under the Religion Clauses. Accommodating neutrality is the doctrine whereby this Court has protected Free Exercise claims from Establishment Clause challenges. Whenever the two clauses conflict Free Exercise claims must supercede Establishment Clause considerations. *See Sherbert v. Verner, supra,* at 409-10; *Wisconsin v. Yoder, supra,* at 234 n. 22. In any such conflict Free Exercise values must be preserved. P. Kurland, "The Supreme Court, Compulsory Education, And The First Amendment's Religion Clauses," 75 *W. Va. L. Rev.* 213, 244 (1973); *see* L. Pfeffer, "The Supremacy of Free Exercise," 61 *Geo. L. J.* 1115, 1142 (1973). Professor Tribe has found that this conclusion accords with the intent of the framers of the Constitution. Tribe, *American Con-*

stitutional Law, at 819 (1978).[5] When the two Religion Clauses overlap, a zone of intersection is created. This Court's recognition that Free Exercise values must be paramount in such cases has been characterized by Professor Tribe as the identification of "the zone which the free exercise clause carves out of the establishment clause for permissible accommodation of religious interests." Tribe, *supra*, at 823. In his words, this is the "zone of permissible accommodation" of Establishment Clause concerns to Free Exercise values.

The principle of accommodating neutrality was well stated by Mr. Justice Douglas in *Zorach v. Clauson*, *supra*, at 313-14 (emphasis supplied).

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.

Accord, Wisconsin v. Yoder, *supra*, at 234 n. 22; *see* 220-21.

In the instant case, the action of the school district is directly contrary to the principle of accommodating the religious beliefs of our citizens. Religious activity has been excluded solely because a room is needed and allowing the use of the room, according to the Second Circuit, "would indicate that the State has placed its imprimatur on a particular religious creed." (A15). This conclusion is logically insupportable. No endorsement of a student Ku Klux Klan or Nazi meeting would be read into a school district decision to make a room available to students for such a meeting (A50). Nor would the use of a room by an Atheists' Club, much less a French club, be construed as an endorsement of the aims of the group using the room. Simply because the group interested in using the room is one whose motivation is religious, rather than philosophi-

5. *Accord, Valent v. N. J. State Bd. of Ed.*, 274 A. 2d 832, 837 (N. J. Super. 1971).

cal or political, should not change the outcome. *NAACP v. Alabama*, 357 U. S. 449, 460-61 (1958).

The Second Circuit expressed concern about possible coercion of other students if school leaders attended voluntary prayer meetings. But surely the potential effect on other students is far greater where the captain of the football team and the student body president get out of their seats in the middle of the formal school day and depart for another locale under a "released time" program, such as the one approved by this Court in *Zorach v. Clauson*. Obviously, far greater pressure to conform is exerted in that situation, but it is not viewed by this Court as so coercive as to violate the Establishment Clause.

The Second Circuit also attempted to distinguish the case of the Muslim who must pray five times a day, or children whose beliefs require prayer before lunch, sports or other activities (A12-13). But this is precisely what has been proven by plaintiffs herein. Their religion requires communal morning prayer with their peers and they are being prevented from doing this. They are situated precisely like the Muslim who must pray five times a day or children whose beliefs require prayer at certain times. But the Court inexplicably ignored this identity.

In the instant case, denying the mere use of a room under circumstances where rooms are available to other groups manifests hostility toward religion, not neutrality. The defendants can avoid any hint of sponsorship of religion by simply issuing a uniform policy regarding the use of rooms before school, making rooms available for any lawful purpose on a first come—first served basis to interested students (A50). If, under such a policy, a group of student Nazis requested a room, and the district assured itself that the purpose was a peaceful one, not posing a threat of substantial disruption, consent could not be withheld. No rational person would contend that the school district was thereby endorsing Nazi activities. In like manner, endorsement of prayer would not be implied by

permitting the students to use a room for that purpose under an evenhanded policy. Any contrary suggestion runs headlong into *Zorach v. Clauson, supra,* which authorizes schools to release students in the middle of formal school activities for religious purposes.

Finally, it should be pointed out that the Second Circuit is inaccurate in stating (A16-17) that school supervision will be necessary. The District Court specifically pointed out, at 487 F. Supp. 1222, that the program would be staffed with volunteer parental supervisors. Even if this were not so, no extra burden would be placed on the school district in any event since the students have to be supervised anyway somewhere on school property after buses arrive. It is also respectfully submitted that the Second Circuit's gratuitous conclusion that it would be necessary to police the activity for voluntariness is a featherlike makeweight (A17). There is no hint in the actual record to suggest that the activity would be anything other than voluntary, nor is there any indication that the participating students or parents would attempt to dragoon other students into praying.

CONCLUSION

In this case the Court below has tilted too far in the direction of avoiding Establishment Clause problems and in so doing has violated the Equal Protection and Free Exercise rights of the plaintiffs. A neutral policy regarding access to rooms before school would permit these plaintiffs to utilize a room for voluntary communal prayer in accord with the mandate of their religion, without doing violence to Establishment Clause rights. Accordingly, a writ of certiorari should issue.

Respectfully submitted,

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Dated: February 13, 1981

CERTIFICATE OF SERVICE

STATE OF DELAWARE }
NEW CASTLE COUNTY } *ss.:*

BE IT REMEMBERED, on this day of February, A. D., 1981, before me, the Subscriber, a Notary Public for the State and County aforesaid, personally appeared, Thomas Stephen Neuberger, who being duly sworn according to law, did depose and say that he mailed today, by First-Class postage pre-paid mail, three copies of the within Brief of the Center for Law and Religious Freedom of The Christian Legal Society as Amicus Curiae in Support of the Granting of Certiorari to the following attorneys:

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THOMAS STEPHEN NEUBERGER

SWORN TO AND SUBSCRIBED before me the day and year aforesaid.

Notary Public